

October 7, 1996

**REPORT OF THE EASTERN DISTRICT
OF NEW YORK COMMITTEE ON CIVIL
LITIGATION/ADVISORY GROUP**

RE: Proposed Amendment to Part VI.A of the CJRA
Plan Regarding Use of Rule 706 Experts

Set forth below is the Report of the Eastern District of New York Committee on Civil Litigation/Advisory Group with respect to the proposed amendment to Part VI.A of the Civil Justice Reform Act Expense and Delay Reduction Plan adopted by the Court, which would permit court-appointed experts to testify at trial by way of deposition.

By letter dated August 22, 1996 the Court's Committee on Civil Litigation/Advisory Group was asked by Chief Judge Sifton to consider an amendment to the Civil Justice Reform Act Expense and Delay Reduction Plan ("CJRA Plan") that would permit court-appointed experts to testify at trial by way of deposition. A Subcommittee was immediately appointed to consider the issues and report back to the full Committee/Advisory Group. The Subcommittee was comprised of Richard W. Reinthaler, Chair, Prof. Oscar G. Chase, Robert N. Kaplan and V. Anthony Maggipinto. A memorandum dated September 16, 1993 was prepared by the Subcommittee and circulated to all members of the Advisory Group. The Subcommittee reported, in their view, that the Board of Judges had the power under the Civil Justice Reform Act to adopt the proposed

amendment to the CJRA Plan; the Subcommittee indicated, however, that they were unable to reach an agreement as to whether adoption of the proposed amendment was advisable.

The full Committee/Advisory Group thereafter met on September 19, 1996 to consider the issues raised by the Subcommittee in its memorandum. What follows is the Report of the full Committee/Advisory Group.

Background

Rule 43(a) of the Federal Rules of Civil Procedure provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." This rule applies to all witnesses, including expert witnesses retained by the parties or appointed by the court pursuant to Rule 706 of the Federal Rules of Evidence.

The use of court-appointed experts in mass tort and complex multidistrict litigation has grown in recent years; the increased use of such experts appears to stem at least in part from some judges' unhappiness with and criticism of "professional testifiers" engaged by the parties. See, e.g., Michael D. Green, Bendectin and Birth Defects, The Challenge of Mass Toxic Substances Litigation (U. of Pa. Press 1996); Marcia Angell, M.D., Science on Trial, The Clash of Medical Evidence and the Law in The Breast Implant Case (W.W. Norton & Co. 1996). Allowing court-appointed experts to testify by way of video-taped depositions would, according to its proponents, result in considerable savings and facilitate the ability of courts to attract eminent neutral scientists, who might otherwise

be reluctant to disrupt their treatment and research schedules, to testify in complex multidistrict cases.

What has been proposed is that a new paragraph 4 be added to Part VI.A. of the CJRA Plan adopted by the Court, which sets forth certain trial practices to be followed with respect to expert witnesses. The provision as amended would thus read as follows (new material underscored):

A. Expert Witnesses

1. In bench trials, the court may direct that an expert's direct testimony be submitted in writing and that only the cross-examination be done before the fact-finder.
2. In bench trials, where appropriate, expert testimony may be taken by deposition.
3. The court may take expert testimony out of the regular order of proof where to do so would avoid delay to facilitate a better understanding of the issues.
4. Where appropriate, and for good cause shown, expert testimony pursuant to Rule 706 of the Federal Rules of Evidence may be taken by deposition and admitted in evidence in jury and in bench trials without the appearance of the expert at the trial.

Other Possible Approaches

In addition to the proposed amendment to the CJRA Plan, a number of other alternative means of achieving the same result (assuming it is determined to be desirable) have been suggested. They include (1) an amendment to Rule 43 of the Federal Rules of Civil Procedure which would expressly permit courts to permit deposition testimony to be used at trial "for good cause shown";¹ (2) an amendment to Rule 32(a) of the Federal Rules

¹ By communication dated April 23, 1996 to the Speaker of the House of Representatives, Chief Justice Rehnquist sent to Congress the following amendment to Rule 43 (new material

of Civil Procedure specifically authorizing the use of the deposition of a court-appointed expert -- independent of normal standards regarding "availability" -- where the parties or representatives with substantially similar interests are afforded the opportunity to participate and examine the expert;² (3) by interpreting Rule 804(b)(1) of the Federal Rules of Evidence to permit such use upon a finding that the declarant is "unavailable" and that the party or parties against whom the testimony is to be offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"; and (4) by relying on the residual hearsay exception contained in Rule 804(b)(5) of the Federal Rules of Evidence.

The difficulty with the first two approaches is that the process of amending the Federal Rules can take five years or more to accomplish. The third approach, interpreting FRE 804(b)(1) in the light and context of existing FRCP 32(a)(3), may, however, have some merit. Rule 32(a)(3) provides that at a trial "the deposition of a

underlined, deleted material crossed-out):

(a) Form. In ~~all every~~ trial, the testimony of witnesses shall be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by a federal law~~, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

This amendment would not, by itself, permit the introduction of deposition testimony of court-appointed experts at trial.

² We understand that this issue may be among those placed on the agenda for the October 1996 meeting of the Committee on Rules of the Judicial Conference of the United States.

witness, whether or not a party, may be used by any party for any purpose" if the court finds that the party offering the deposition has been unable to procure the attendance of the witness or "such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." (Emphasis added).

As the underscored text above makes clear, while the rule applies to all witnesses (and thus presumably includes any person who has been identified as an expert), it only permits the use of deposition testimony at trial upon the offer of a party and thus by its terms would not apply to a court appointed expert unless a party to the action were to offer such testimony at trial. This may be more of a theoretical rather than a practical limitation, however, as it is likely that court-appointed experts will often form opinions that support the claims asserted by one of the parties in a given case.³

Rule 32(a)(3) has in fact been interpreted to permit expert testimony to be introduced via deposition. Reber v. General Motors Corp., 669 F. Supp. 717 (E.D. Pa. 1987) (doctor who had very busy schedule and whose deposition was videotaped specifically for trial qualified as "special circumstances" under Rule 32(a)(3)(E)); Borchardt v. United States, 133 F.R.D. 547 (E.D. Wisc. 1991) (plaintiff sought permission to present

³ Given the specificity of the Federal Rules in this area, district judges may be reluctant to use the residual hearsay exception to permit opinion testimony (rather than facts) to be introduced in circumstances that appear to be at odds with the express provisions of the Federal Rules of Civil Procedure, although some commentators have suggested that the "catch-all" exception to the hearsay rule "might make deposition testimony admissible although Rule 32(a)(3) does not." 8A Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2146, at 179 (1994).

testimony of his expert witness (whose credibility was not in question) at trial by way of deposition to save the expense of his testifying twice; court, stating that it "prefers to use the most cost-effective method of providing the facts to the fact-finder whenever possible" and that "[a]lthough live testimony is preferable to deposition testimony, there is no need to insist upon live testimony when the credibility of the witness is not in question," found the facts of the case to be an "exceptional circumstance" under Rule 32(a)(3)(E)); Weiss v. Wayes, 132 F.R.D. 152 (M.D. Pa. 1990) (allowing defendant to introduce at trial videotaped cross-examination of plaintiff's medical expert, finding that so long as the requirements of Rule 32 are satisfied, the use of videotaped testimony, "which captures the sight and sound, as well as the demeanor of the witness," should be "encouraged and not impeded because it permits the jury to make credibility evaluations not available to it when a transcript is read by another"); Savoie v. LaFourche Boat Rentals, Inc., 627 F.2d 722 (5th Cir. 1980) (Rule 32(A)(3) permits one party to introduce at trial deposition of expert witness taken by another party "for discovery purposes" where the witness was out of the country at the time of trial).⁴

Research by the Subcommittee uncovered no reported decision applying either Rule 32(a)(3), FRE 804(b)(1) or the residual hearsay exception to the testimony of court-appointed experts. The few reported cases under Rule 32(a)(3) cited above make no

⁴ The Sixth Circuit, however, has rejected the assertion that exceptional circumstances routinely exist with regard to medical experts, who should not be viewed as "automatically unavailable" due to their busy schedules. Allgeier v. United States, 909 F.2d 869 (6th Cir. 1990).

reference to Rule 706 experts. Nor are the rationales employed by the courts in these cases consistent (depositions should be allowed where credibility is not in issue; depositions should be allowed by videotape so that credibility and demeanor can be evaluated). While they offer some support for the proposition that deposition testimony of court-appointed experts may be admitted where the requirements of Rule 32(a)(3) can be satisfied, no assurance can be given that this result would (or should) follow in any particular case.

The Board of Judges Has the
Authority under the CJRA to
Adopt the Proposed Amendment

Amending the CJRA Plan as proposed would put this matter to rest, at least within the Eastern District, without having to rely on judicial interpretation of existing rules or wait until the federal rules amendment process can be completed. Whether or not such an amendment to the CJRA Plan is permissible, however, depends, first, on whether the Civil Justice Reform Act provides authority to federal courts to include in their CJRA Plans provisions dealing with the use of court-appointed expert testimony at trial, and, second, on whether such a provision, if included in the CJRA Plan, would override any inconsistent provisions of the Federal Rules.

The latter issue is the subject of an article by Ed Wesely entitled The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83 -- What Trumps What?, 154 F.R.D. 563-78 (1994). The author concludes that the CJRA provides a legislative override to the Rules Enabling Act which allows a District Court to promulgate a CJRA Plan that is inconsistent with the

Federal Rules of Civil Procedure, notwithstanding Rule 83, so long as the Plan deals with a matter specifically addressed in the CJRA. Accord, Cavanagh, The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied By Local Rules?, 67 St. John's L.Rev. 721, 727 and n.29 (1993). The members of the Committee/Advisory Group endorse this conclusion.

The sole remaining issue, then, is whether the CJRA authorizes District Courts to include in their CJRA Plans specific provisions dealing with the use of depositions and, in particular, deposition testimony by experts, at trial. When the original CJRA Plan was drafted, it appears that both the Board of Judges and the Advisory Group believed that such authority existed. Part VI.A. of the Plan deals with this very subject, although it does not specifically refer to court-appointed experts. The proposed amendment to the CJRA Plan is, in our view, consistent with the approach taken when the Plan was adopted and does not appear to raise any unique issues regarding the source of the Court's authority to adopt such a rule.

The authority to proceed under the CJRA is not entirely clear, however. There is no specific provision in the Act dealing with experts or the use of depositions at trial. Under the CJRA, each District Court was required to formulate its own CJRA Plan in order to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. 471. The Act goes on to provide that in formulating their respective

CJRA Plan, each District Court "shall consider" certain specified principles and guidelines relating to differential treatment of civil cases, early and ongoing control of the pretrial process through involvement of a judicial officer, careful and deliberate monitoring of cases through discovery-case management conferences, encouragement of cost-effective discovery, conservation of judicial resources, and use of alternative dispute resolution programs. Id. § 473(a). In addition, each District Court was required to "consider and may include" a non-exclusive list of litigation management and cost and delay reduction techniques, along with "such other features as the district court considers appropriate after considering the recommendations of the advisory group. . . ." Id. § 473(b)(6).

The Court's authority to adopt the proposed amendment should be considered in light of the provisions of the Act taken as a whole in order to effectuate its purposes. Without doubt, Part VI.A. of the Eastern District Plan was designed to facilitate the adjudication of civil cases, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes. The catch-all feature of § 473(b)(6), coupled with the emphasis on "early and ongoing control of the pretrial process through involvement of a judicial officer," and the fact that the Plan itself, as approved by the Court, has been widely disseminated without any question having been raised as to the Court's authority to include Part VI.A., all support the conclusion that the proposed amendment, if enacted, would be within the scope of the Court's authority under the CJRA.⁵ By a vote of 10 to 3 (with 2

⁵ One of the purposes of the CJRA was to encourage experimentation by District Courts with new procedures designed to facilitate the just, speedy and inexpensive resolution of civil disputes. Implementation of the proposed amendment (which would remain in effect until December

abstentions), the members of the Advisory Group concluded, at the September 19 meeting, that the Board of Judges would have the power, if they so chose, to adopt the proposed amendment to the CJRA Plan.

The Advisability of the Proposed Amendment

Once it was concluded that the proposed amendment to the CJRA Plan would be authorized by the text of the CJRA, the Advisory Group turned its attention to the advisability of the proposed amendment if adopted pursuant to the CJRA or otherwise. Critics of the proposed amendment pointed out several potential shortcomings, such as (a) the omission of language regarding the ability of parties to introduce the deposition testimony of a court-appointed expert if the court ultimately determines, following the deposition, not to rely upon such expert, and (b) the omission of language safeguarding the rights of litigants to inquire into matters that only come to light at trial or as a result of the testimony of other experts. It was also noted that court appointed experts can significantly influence juries and have an impact on the credibility of experts retained by the parties and that the proposed new paragraph 4, if adopted, may encourage more frequent use of Rule 706 experts. The advisability of this was viewed as debatable, even if limited to the mass tort context. In this connection, several members expressed skepticism that court-appointed

31, 1997, unless the life of the CJRA Plans is further extended by Congress) would be consistent with this objective and may also assist the deliberations of the Judicial Conference in considering any proposed amendments to FRCP 32 and/or 43.

experts, given their inherent prejudices and biases from their own work and studies, could ever be viewed as "neutral."

Another concern expressed was that the new rule, as proposed, would only apply to court-appointed experts. Several members expressed doubt as to whether court-appointed experts should be treated differently than party experts. Others questioned the advisability of using the CJRA Plan, even assuming the power to adopt the proposed amendment exists, and even if done on an experimental basis, as the preferred vehicle for effecting such a change. According to some of these members, the proposed amendment represented too far a departure from the Federal Rules to warrant such a change through the CJRA Plan, even though permissible to do so. By a vote of 10 to 2 (with 3 abstentions), the members concluded that it would be inadvisable to implement such a change through an amendment to the CJRA Plan; a majority of members, however (by a vote of 9 to 4, with 2 abstentions), thought that allowing court-appointed experts' depositions to be used at trial had merit. Several members of the Committee commented that such a procedure might be particularly useful in mass tort litigation. In short, a majority of the members of the Advisory Group believe there may be merit to the proposal that court-appointed (and perhaps other) experts be allowed, in certain circumstances "for good cause shown," to testify at trial via videotaped deposition. Given the conflicting views regarding the advisability of the proposal and the importance of the issues raised, however, even those members who believe that the proposal has merit do not believe that the CJRA Plan is the proper vehicle to implement such a change.

Conclusions

The Committee/Advisory Group believes that the Board of Judges has the power under the CJRA to adopt the proposed amendment to the CJRA Plans, but recommends against an amendment to the Plan at this time that would authorize the use at trial of deposition testimony of court-appointed experts.

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